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Case No. 6840-VCP

**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

MICH II HOLDINGS LLC,
SEEVA II HOLDINGS LLC,
MICH HOLDINGS LLC,
and SEEVA HOLDINGS LLC,

Plaintiffs,

v.

RUBIN SCHRON
and CAM-ELM COMPANY LLC,

Defendants,

and

SMV PROPERTY HOLDINGS LLC
and SWC PROPERTY HOLDINGS LLC,

Nominal Defendants.

C.A. No. 6840-VCP

**MEMORANDUM OPINION**
Submitted: July 24, 2012
Decided: August 7, 2012

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**PARSONS, Vice Chancellor.**

This action involves a dispute between certain members of two Delaware real estate holding companies, nominal Defendants SWC Property Holdings LLC ("SWC") and SMV Property Holdings LLC ("SMV" and together with SWC, the "Companies"), and the Companies' manager, Rubin L. Schron. Plaintiffs, members MICH Holdings LLC, MICH II Holdings LLC, SEEVA Holdings LLC, and SEEVA II Holdings LLC (together, the "MICH and SEEVA Entities"), originally brought an action against Schron and Schron-affiliated entities in New York in March 2010 (the "MICH/SEEVA Action") alleging various breaches of fiduciary duty, as well as breaches of the Companies' operating agreements (the "Operating Agreements"). In response to the MICH/SEEVA Action, Schron filed an opposing action in New York against the MICH and SEEVA Entities' majority owners and controllers, Leonard Grunstein and Murray Forman, as well as related parties, alleging breaches of fiduciary duty and legal malpractice, among other things.

In June 2011, the New York court dismissed the MICH/SEEVA Action, holding that § 9.4 of the Operating Agreements required all claims against the Companies, including derivative suits where the Companies are nominal defendants, to be brought in Delaware. As a result, Plaintiffs filed this action on September 6, 2011, and Schron moved to stay or dismiss the action on October 10, 2011.

In a Memorandum Opinion on June 29, 2012 (the "June 29 Opinion"), I determined that the issues and parties in this action and the New York Action were substantially similar and that the New York Action had the potential to resolve all or a

substantial number of the claims at issue here.[1] Therefore, I granted Defendants' motion to stay this action in favor of Schron's first-filed New York Action. Then, on July 9, 2012, Plaintiffs moved for reconsideration of the June 29 Opinion, or alternatively, certification of an interlocutory appeal.

This Memorandum Opinion addresses Plaintiffs' combined motions for reconsideration under Court of Chancery Rule 59(f) and certification of an interlocutory appeal pursuant to Supreme Court Rule 42 (the "Motion"). Having considered Plaintiffs' arguments, I conclude that, with the exception of Plaintiffs' claim regarding Defendants' withholding of certain distributions allegedly owed to Plaintiffs, the Motion should be denied. Plaintiffs have not demonstrated that this Court misapprehended any controlling fact or legal principle in rendering the June 29 Opinion, nor have Plaintiffs demonstrated that the issues here warrant certification of an interlocutory appeal. Therefore, for the reasons stated herein, with one exception, I deny Plaintiffs' Motion.

## I. MOTION FOR REARGUMENT

The standard applicable to a motion for reargument under Rule 59(f) is well settled. To obtain reargument, the moving party must demonstrate either that the Court overlooked a controlling decision or principle of law that would have a controlling effect, or the Court misapprehended the facts or the law so the outcome of the decision would be

[1] *See generally MICH II Hldgs. LLC v. Schron*, 2012 WL 2499507 (Del. Ch. June 29, 2012).

different.[2] It is the moving party's burden to show that "the court's misunderstanding of a factual or legal principle is both material and would have changed the outcome of its earlier decision."[3] As such, motions for reargument must be denied when a party merely restates its prior arguments.[4]

Here, Plaintiffs seek reargument on five separate grounds, asserting that the Court materially misapprehended material issues of fact and law in deciding to stay this action. Having considered Plaintiffs' arguments, I find that they generally do not state a valid basis for reargument or reconsideration of the June 29 Opinion. As to Plaintiffs' argument regarding the discrete issue of Defendants' withholding of certain distributions allegedly owed to Plaintiffs, however, Plaintiffs essentially have supplemented the record by reporting that they have rejected the Court's suggestion in the June 29 Opinion that they pursue that aspect of their claims in the New York Action. Based on that information, I will alter the stay order slightly to enable Plaintiffs to proceed in this Court only on the narrow claim regarding Defendants' withholding of distributions. I deny Plaintiffs' motion to reargue in all other respects.

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2 *See, e.g.*, *Medek v. Medek*, 2009 WL 2225994, at *1 (Del. Ch. July 27, 2009); *Reserves Dev. LLC v. Severn Sav. Bank, FSB*, 2007 WL 4644708, at *1 (Del. Ch. Dec. 31, 2007).

3 *Medek*, 2009 WL 2225994, at *1 (internal quotation marks omitted); *see also Serv. Corp. of Westover Hills v. Guzzetta*, 2008 WL 5459249, at *1 (Del. Ch. Dec. 22, 2008).

4 *Guzzetta*, 2008 WL 5459249, at *1; *Reserves Dev. LLC*, 2007 WL 4644708, at *1. "Reargument . . . is only available to re-examine the existing record; therefore, new evidence generally will not be considered on a Rule 59(f) motion." *Reserves Dev. LLC*, 2007 WL 4644708, at *1.

### A. Rescission

Plaintiffs' first ground for reargument is their claim that this Court erred in holding that the New York court conceivably could order rescission of the interests of Grunstein, Forman, and Lawrence Levinson in the MICH and SEEVA Entities, which, in turn, could enable Schron to cause Plaintiffs to stop litigating in Delaware. According to Plaintiffs, such a ruling is contrary to the earlier decision of this Court in the books and records action between the parties where I expressly stated that "[t]he fact that [Plaintiffs] membership might be lost or rescinded in the future is not considered relevant."[5] Plaintiffs also argue that the Court's ruling ignores the fact that no claim or motion has ever been made in the New York Action seeking rescission of the membership interests of the MICH and SEEVA Entities in SMV and SWC.

As an initial matter, Plaintiffs' argument that the Court failed to recognize that a motion or argument for rescission has not been made against the MICH and SEEVA Entities' membership interests in the New York Action overlooks the plain language of the June 29 Opinion. In the opinion, I expressly acknowledged the situation before the New York court and explained:

> There is no dispute that the MICH and SEEVA Entities were established for the sole purpose of receiving equity interests in SMV and SWC. Therefore, instead of ordering direct rescission of the MICH and SEEVA Entities' membership interests in SMV and SWC, the New York court conceivably could order rescission of Grunstein, Forman, and Levinson's interests in the MICH and SEEVA Entities and perhaps even transfer those interests to Schron. If that occurred, Schron effectively would gain control of the MICH and SEEVA

[5] Pls.' Br. Ex. A at 38 (Oct. 27, 2011 Transcript Ruling).

> Entities and this litigation. As a result, although rescission would not directly deprive the MICH and SEEVA Entities of standing to pursue their claims, as a practical matter, resolution of the New York Litigation could enable Schron to force the MICH and SEEVA Entities to stop litigating in Delaware.
>
> Whether the New York court can order rescission in the manner Defendants envision turns on New York law and should be decided in the New York Litigation. For purposes of this Memorandum Opinion, however, I find the possibility of relief in the nature of rescission in the New York Litigation to be sufficiently colorable as to provide additional support for staying this action until that matter can be resolved. Rescission of Grunstein, Forman, and Levinson's membership interests in both SMV and SWC through the MICH and SEEVA Entities drastically would undermine Plaintiffs' ability to pursue their claims in this action and effectively could terminate, or materially reduce the scope of, these proceedings.[6]

Plaintiffs plainly disagree with this conclusion. Plaintiffs have not shown, however, that I overlooked or disregarded any material point of New York law. In any case, such an argument would be futile because, as I stated in the June 29 Opinion, any such matter of New York law should be decided by the New York court. Therefore, I reject Plaintiffs' assertion that this Court's observations regarding the possibility of rescission provide a basis for reargument.

I also find unpersuasive Plaintiffs' contention that the June 29 Opinion is contrary to the Court's own statements in resolving Plaintiffs' earlier action for inspection of the books and records of SMV and SWC under 8 *Del. C.* § 220. Plaintiffs' § 220 action is

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[6] *MICH II Hldgs. LLC*, 2012 WL 2499507, at *11.

distinct from this action and I allowed the § 220 action to proceed for reasons not present here.

In declining to stay Plaintiffs' § 220 action, I noted that the scope of the § 220 action was limited solely to the inspection of the books and records of SMV and SWC and, therefore, was "distinct from the New York action" and involved different issues.[7] I further explained that the issues in the New York Action and the § 220 action were substantially different, in part, because the § 220 action was "a summary proceeding," that was "limited in scope," and "relate[d] to the particular rights of a member of a Delaware LLC to access documents of that LLC."[8]

In contrast, the current action is largely plenary, not summary, in nature. Moreover, as I determined in the June 29 Opinion, this action and the New York Action present substantially similar issues sufficient to warrant a stay under *McWane*. Therefore, there is nothing inconsistent between my previous ruling that the possibility of rescission was immaterial to granting a stay in the § 220 action and the contrary conclusion I reached based on the different circumstances presented by Defendants' motion to stay this action.

Finally, although I concluded that the possibility of rescission weighed in favor of staying Plaintiffs' action here, my decision to stay Plaintiffs' action was based independently on the overlap between the issues relating to the Citibank Swap and the

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[7] Pls.' Br. Ex. A at 32-33.

[8] *Id.* at 33.

Omnicare Transaction.[9] In other words, even if there were no possibility of rescission of the MICH and SEEVA Entities' membership interests in New York, such a change would not have affected the outcome of my decision to grant a stay. Therefore, this aspect of Plaintiffs' motion does not provide a sufficient basis for reargument.[10]

**B. Defendants' Contrary Statements to the New York Court**

Plaintiffs also argue that this Court should not have credited Defendants' assertion that the issues in this action are substantially similar to those in the New York Action because Defendants made contrary representations to the New York court in support of their successful effort to dismiss the MICH/SEEVA Action. This is not an argument, however, that this Court misapprehended a material fact or the law in arriving at its decision. Instead, it is a rehashing of an argument Plaintiffs already made, and I rejected, in deciding to grant a stay. That Plaintiffs disagree with the weight I gave Defendants' statement to the New York court is not a valid basis for reargument.

Moreover, I note that both the Grunstein Parties and Schron made representations in the New York Action regarding the substantial similarity of their claims that conflict with assertions they made in this action. Although Plaintiffs emphasize Defendants' representation to the New York court that the issues upon which this action is based and

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9 *MICH II Hldgs. LLC*, 2012 WL 2499507, at *10.

10 *Cont'l Ins. Co. v. Rutledge & Co.*, 2000 WL 268297, at *1 (Del. Ch. Feb. 15, 2000) ("The Court of Chancery will not grant a motion for reargument 'unless the Court has overlooked a decision or principle of law that would have controlling effect or the Court has misapprehended the law or the facts so that the outcome of the decision would be affected.'").

those in the New York Action are not substantially similar, Plaintiffs likewise represented to the New York court in the MICH/SEEVA Action that the issues before it in the New York Action were "*the same issues* brought by SMV and SWC in the derivative claims in the [MICH/SEEVA] action."[11] In the same vein, Plaintiffs also argued in New York that "the complaint by SMV and SWC in the [New York] Action specifically puts at issue all the allegations and claims made in the [MICH/SEEVA] Action brought on behalf of SMV and SWC . . . ."[12] Because most of the claims in this action in Delaware stem from the MICH/SEEVA Action, Plaintiffs' current argument here arguably contradicts the position they previously advanced in New York.

In light of both sides' conflicting representations, I informed the parties at the March 29, 2012 hearing that I was "not going to put too much stock" in the statements made in New York regarding the similarity or dissimilarity of the issues as they related to the New York Action.[13] Indeed, neither side's statements in New York weighed heavily in my decision to grant Defendants' motion to stay. For all of these reasons, I find that these issues provide no basis for reargument as sought in Plaintiffs' Motion.

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[11] Defs.' Opening Br. in Support of Defs.' Mot. to Stay, or in the Alternative, to Dismiss for Failure to State a Claim, Docket Item No. 7, Ex. B at 12 (Dec. 27, 2011) (emphasis added).

[12] *Id.* at 13.

[13] Mar. 29, 2012 Hr'g Tr. 11.

### C. Plaintiffs' Escrow Claims

Plaintiffs make two claims in the context of their motion to reargue related to Schron's withholding of $3.5 million in distributions allegedly owed to Plaintiffs. First, Plaintiffs argue that Schron's refusal to recognize their membership interests in SMV and SWC constitutes irreparable harm and that this Court erred by not granting them prompt relief. Plaintiffs also assert that this Court misapprehended the fact that Plaintiffs' escrow claim can only be brought in Delaware when it granted Plaintiffs leave to bring that claim in New York.

Both of these arguments relate to Plaintiffs' claim in this Delaware action that Schron, as manager of SMV and SWC, wrongfully is withholding distributions from Plaintiffs by placing those distributions into escrow instead of paying them directly to the MICH and SEEVA Entities. I did not misapprehend any of the relevant law or facts related to this issue. In the June 29 Opinion, I noted that, in their briefing on the motion to stay, Defendants agreed to waive the forum selection clause under § 9.4 of the SMV and SWC Operating Agreements to allow Plaintiffs' escrow claims to be litigated in New York. Based on that and the fact that Plaintiffs originally chose to bring their claims against Schron in New York, I also stated that:

> In the interests of allowing prompt adjudication of Plaintiffs' equitable claims for release of those escrowed distributions, this Court has no objection to Plaintiffs filing their claim in New York so that it may be adjudicated there along with the rest of the New York Litigation. If the New York court determines that Plaintiffs' equitable claim relating to the escrow cannot proceed in New York for any reason, however, Plaintiffs may seek to reactivate their claim here and I will reconsider at that time whether the escrow claim should

> proceed in Delaware in parallel with the New York Litigation.[14]

In their motion for reconsideration, however, Plaintiffs rejected that invitation and insisted on pursuing their escrow claim in Delaware.[15]

Unfortunately, there appears to be a high degree of gamesmanship on both sides of this overall dispute, which, when all the claims of the Grunstein Parties and Schron are considered, involves far more than $100 million. Plaintiffs' escrow claim, which currently pertains to distributions in the range of $3.5 million, is relatively small in comparison. Nevertheless, because it challenges self-help actions taken by a controller of two Delaware LLCs to the detriment of holders of minority interests in those companies, the escrow claim raises potentially important issues that should be addressed in a timely fashion. Despite Plaintiffs' protestations to the contrary, there is no reason to doubt that the New York court could have dealt with the escrow issue promptly with a modicum of cooperation from the parties. But, it may have been overly optimistic to have expected such cooperation. More importantly, this Court did consider, in the context of the June 29 Opinion, Plaintiffs' choice of forum, and now must reconsider that issue in view of Plaintiffs' rejection of the Court's suggestion that they pursue their escrow claim in New

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[14] *MICH II Hldgs. LLC*, 2012 WL 2499507, at *11.

[15] In this respect, I consider it more appropriate to analyze Plaintiffs' Motion as a Rule 59(e) motion to alter or amend a judgment. Plaintiffs do not seriously assert that the Court misapprehended a fact or law, but rather rely on a new development, *i.e.*, their refusal to bring their escrow claim in the New York Action, in requesting relief from the order implementing the June 29 Opinion.

York, where they initially brought their claims and where most of the relevant issues in the parties' wide-ranging dispute will proceed first.

The issues presented by the escrow claim appear to be sufficiently discrete and separable from the issues presented in the New York Action to enable this Court to entertain that claim in Delaware without creating undue risk of wasteful, overlapping proceedings and conflicting judgments with the New York Action. In their escrow claim, Plaintiffs essentially contend that Schron breached the SMV Operating Agreement, his duties thereunder, and his fiduciary duties, by improperly failing to declare and make necessary and appropriate distributions of SMV's profits. In addition, Plaintiffs claim that Schron breached the SWC Operating Agreement by failing properly to calculate and distribute declared distributions to Plaintiffs. The relief sought includes release of the escrowed funds. To the extent Schron has made distributions from SMV or SWC or both and not paid those distributions to Plaintiffs, but rather put the funds in escrow, I will allow Plaintiffs' escrow claim to proceed in Delaware in parallel with the New York Action. I recognize that one or both sides to this dispute may attempt to complicate that effort by trying to inject into the litigation regarding the validity of Schron's nonpayment of distributions from SMV or SWC to Plaintiffs a number of broader issues from the New York Action. I intend to resist any such efforts, and am confident that the legal propriety of Schron's escrowing of distributions otherwise due to Plaintiffs can be addressed here with minimal, if any, overlap with the New York Action. Thus, in that narrow sense, and based on Plaintiffs' refusal to pursue the escrow claim in New York, even if Schron

waives any reliance on the forum selection clause, I grant in part Plaintiffs' motion for reconsideration.

### D. Forum Selection Clause

Finally, Plaintiffs' claim that the Court misinterpreted the primary import of the Supreme Court's ruling in *Ingres v. CA, Inc.*[16] merely rehashes the argument that Plaintiffs made in their briefing on the motion to stay. The Court's reasons for rejecting Plaintiffs' interpretation of *Ingres* are described fully in the June 29 Opinion and need not be repeated here. Plaintiffs' attempt to reargue a point already made and rejected is not a valid basis for reconsideration.

## II. MOTION FOR INTERLOCUTORY APPEAL

Plaintiffs have moved, in the alternative, for leave to file an interlocutory appeal pursuant to Supreme Court Rule 42(b). In considering this aspect of Plaintiffs' Motion, I observe first that the Supreme Court only accepts such appeals in extraordinary or exceptional circumstances.[17] When considering whether to certify an interlocutory appeal, this Court must balance the interests of advancing potentially case-dispositive issues against the additional burden of fragmentation and delay that interlocutory review can create.[18] Generally, where interlocutory review is unlikely to terminate the litigation

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16 8 A.3d 1143 (Del. 2010).

17 *See Ryan v. Gifford*, 2008 WL 43699, at *4 (Del. Ch. Jan. 2, 2008); *In re Pure Res., Inc. S'holders Litig.*, 2002 WL 31357847, at *1 (Del. Ch. Oct. 9, 2002).

18 *In re Pure Res.*, 2002 WL 31357847, at *1.

or otherwise serve the administration of justice, certification should be denied.[19] Moreover, Supreme Court Rule 42 proscribes interlocutory appeals unless the order of the trial court to be appealed from (1) determines a substantial issue, (2) establishes a legal right, and (3) meets at least one of the criteria in Rule 42(b)(i)-(v).[20] Such determinations are left to the discretion of the trial court.[21] Finally, I note that, relevant to this action, our Supreme Court generally does not accept interlocutory appeals relating to motions to stay because motions to stay usually do not address the substantive merits of the parties' underlying claims, which is the central focus of the Rule 42 analysis.[22]

Having considered Plaintiffs' application, I do not find that this action presents any extraordinary or exceptional circumstances that would warrant interlocutory review. Moreover, because the issues decided in the June 29 Opinion relate to Defendants' motion to stay a first-filed action under *McWane*, this Court has not yet addressed the substantive merits of Plaintiffs' underlying claims. In addition, the Court's decision to allow Plaintiffs to pursue their escrow claim in Delaware severely undermines Plaintiffs' argument that the challenged order established a legal right. As a result, I conclude that

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19 Donald J. Wolfe, Jr. & Michael A. Pittenger, Corporate and Commercial Practice in the Delaware Court of Chancery § 14.04 (2008) (hereinafter "Wolfe & Pittenger").

20 *In re Pure Res.*, 2002 WL 31357847, at *1.

21 *O'Brien v. IAC/Interactive Corp.*, 2009 WL 2998531, at *1 (Del. Ch. Sept. 14, 2009).

22 *Sprint Nextel Corp. v. iPCS, Inc.*, 2008 WL 2861717, at *2 (Del. Ch. July 22, 2008); Wolfe & Pittenger § 14.04(d).

Plaintiffs' application does not meet the criteria of Rule 42 requiring that the trial court's order (1) address a substantial issue relating to the merits of the case[23] and (2) establish a legal right with regard to that underlying substantial issue.[24] Therefore, I deny Plaintiffs' request for certification of an interlocutory appeal.

## III. CONCLUSION

For the reasons stated, I deny Plaintiffs' Combined Motion for Reconsideration or, in the Alternative, Application for Certification of Interlocutory Appeal in all respects, except that I grant the Motion to the limited extent of modifying the order associated with the June 29 Opinion to authorize Plaintiffs to proceed promptly in this Court on their claim related to Defendants' withholding of $3.5 million of distributions allegedly owed to Plaintiffs.

**IT IS SO ORDERED.**

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[23] *Id.* ("The 'substantial issue' requirement is met when an interlocutory order decides a main question of law which relates to the merits of the case, and not to collateral matters.").

[24] Wolfe & Pittenger § 14.04(b) ("[A] legal right is established where the court determines an issue essential to the position of the parties regarding the merits of the case.").